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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 548

MEYER GORDON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF.

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Mindful that it is not the office of a reply brief to recanvass the merits of the case at large, we confine this brief to a short but, we think, most important response to the brief of the Government.

I.

The Government's brief undertakes to assay the facts. But the Trial Judge's declaration as to the facts supports petitioner, not the Government.

The Government's brief is almost entirely devoted to arguing that the Trial Judge would have been justified

in disbelieving Banning's recantation and petitioner's affidavit asserting his innocence.

But the Trial Court actually declared that

(1) Credence in Banning's testimony was essential to conviction,

(2) No jury would, in the light of the newly discovered evidence, now believe Banning, and

(3) He, the Trial Judge, did not necessarily believe his trial testimony, and had never said anywhere that he had done so.

This is *not* a case where the petitioner is dissatisfied with the Trial Judge's resolution of questions of immediate fact or mediate factual inference. It *is* a case in which petitioner not only *accepts the Trial Judge's declarations as to the facts,* but relies upon those declarations as entitling him to a new trial.

The Government is quite correct when it says, as this Court has so often said, that weighing the facts is the function of the Trial Judge, not of the Circuit Court or of this Court. (*U. S.* v. *Johnson,* 327 U. S. 106). But in this case that rule aids the petitioner, not the Government.

II.

This case propounds a basic question as to the proper canon of judicial discretion on motions for new trial on the ground of newly discovered evidence.

The Government's own cases (pages 32-33, Government's brief), as well as those cited by petitioner (pages 30-32, petitioner's brief), show plainly that there is a contrariety of opinion among the lower courts as to

whether the criterion on a motion for new trial on the ground of newly discovered evidence is

Does the *Trial Judge* believe the newly discovered evidence?

or

Does the Trial Judge believe that a *jury* would believe that evidence?

Since, as the Government contends, a Trial Judge's decision is final where the evidence is fairly conflicting (*and the hearing is otherwise fair*), it is most important that this Court guide Trial Judges, not by reweighing the facts in particular cases, but by an authoritative pronouncement as to the proper *critique* for the Trial Judge: Is he, as an individual, to take the responsibility for weighing the newly discovered evidence, or is he to decide whether a jury should ponder the new proofs?[1]

The presence of this question in the record, with diversity of opinion reflected in the lower court's decisions cited in petitioner's brief, (pages 32-33) should, we submit, elicit *certiorari*.

III.

This is not a case of mere recantation. It is a case where independent evidence demonstrates perjury at the trial on the part of the recanting witness.

The record is indeed replete with Banning's recantations. But it is replete with more than that.

[1] To our knowledge, this Court has never declared what the true test should be where recantations are involved, or where, as in this case, the evidence consists of recantations plus substantial and uncontradicted independent evidence showing the witness' perjury. Neither *U. S.* v. *Johnson* 327 U. S. 106 nor *Griffin* v. *U. S.* 336 U. S. 704 involved recantation evidence.

In petitioner's original brief, he demonstrated that Banning testified, not only that he had not been promised, but that he was not *expecting* reward.

It now appears, by evidence entirely independent of Banning's recantations, and which did not exist when Banning implicated petitioner on the latter's trial, that Banning has been *lavishly* rewarded.

The test is not, as the Government suggests, (page 47, Government's brief) whether Banning had been *promised* any reward for convicting petitioner. It is whether Banning *expected* anything, whether it had been promised or not.

The Government's assumption that as long as they did not expressly promise him immunity, there is an end to the matter, is excessively naive, for the important thing and the proper test is not what was said by the prosecutor, but what was in the mind of the witness. See *Farkas* v. *United States,* 2 F. (2d) 644, (CCA 6); *Sandroff* v. *United States,* 158 F. (2d) 623 (CCA 6); *Alford* v. *United States,* 282 U. S. 687, 692-93, 51 S. Ct. 218, 75 L. Ed. 624; *Stevens* v. *People,* 215 Ill. 593, 601.

The Government let Banning swear that he had no hope of reward. Then it rewarded him.[2]

We say, *and the Trial Judge found and declared* (Tr. 235-236) that the Government intended to reward Banning and that Banning expected such a reward.[3]

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[2] The Circuit Court of Appeals said (Tr. 337), "And he (Banning) certainly did receive advantageous consideration from the Government, through obtaining a pardon for the Weiss crime (which he did not commit), and by being allowed to go free on bond after he had pleaded guilty to the Ollendorf robbery, as well as being given help by Government officials in securing employment, and in other ways."

[3] Petitioner's evidence concerning (a) The bet between Banning and Agent Johnson and (b) the thrice repeated offer by FBI agents to "do Banning a lot of good and not to indict his wife at Fort Wayne (both occurring before the trial) was not disputed by any evidence on the record. The Government's statement (p. 43) that they had evidence which they did not file—is clearly improper.

The Government, now tacitly admitting what the Circuit Court of Appeals found to be true (Tr. 337) that Banning, indeed, received "advantageous consideration" from the Government, now argues (page 41, Government's brief) that the jury *probably did not believe Banning's disclaimer* of personal motivation anyway and presumably was not swayed by the prosecutor's argument to the effect that he, Banning, "Faced 20 years in this case and 10 years at Cleveland."

How can anyone speculate on that, especially where Banning's credibility was of such vital moment at the trial? Indeed, we are constrained to ask, should 20 years of a man's life depend on the thread of such speculation?

The incrimination of petitioner in the instant crime required belief of Banning's trial testimony. The Trial Judge so says. The Court of Appeals so says. Banning is now a proved perjurer. The Trial Judge says no jury would now believe him. The Trial Judge does not believe him.

On these demonstrations and findings petitioner is entitled to a new trial.

IV.

The Trial Judge's excursion to the penitentiary denied petitioner due process of law.

We do not repeat our demonstration that the Trial Judge's secret trip to the penitentiary was error. The Government does not appear to challange that demonstration.

But, says the Government, petitioner was not prejudiced by this trip.

There are two replies to this contention of the Government's:

First: The fact that one cannot usually tell when such an excursion as that involved in this case prejudices, and when it does not prejudice, a defendant is the very reason that the law forbids it. If one could know that a prisoner would not be prejudiced by such a secret inquisition on the part of a judge, such inquisitions should not be forbidden —they should be encouraged.

Second: We can be as sure as we are likely to in any case that petitioner *was* prejudiced. If the Trial Judge had not had doubts, misgivings and uncertainties as to the facts in this case, he would not have made the trip. *But the defendant is entitled to the doubts, misgivings and uncertainties of the trier of his facts.* And he is entitled to the Trial Judge's decision on the facts free from impressions, conscious or latent, deliberately engendered, or at least invited, by excursions such as that undertaken by the Trial Judge in this case.

This Court places great confidence in juries, administrative boards, and Trial Judges as triers of questions of fact. *Therefore it is of fundamental importance that the modes and methods of trying the facts be as pure and untainted as due process of law can make them.*

The Government suggests that petitioner waived his objection to the Trial Judge's extra-judicial excursion by not insisting that the Judge disqualify himself before he had announced his decision. But the Government simultaneously argues that the petitioner had no ground of objection until prejudice should appear. If, as the Government says, prejudice must appear before the petitioner has a basis of objection, it is clear that he has no right that he may waive until the Court has decided the motion.

There is a more forcible answer to this suggestion:

No defendant should be forced into the position of attacking the fairness of a judge before whom his case is under consideration.

Certainly he should not be compelled to make such an attack in advance of the decision.

In addition it is quite clear from the record that had the petitioner made such a motion it would have been summarily overruled for when petitioner's counsel protested the Court's suggestion that the Court go out and interview Banning and when counsel suggested that Banning should be subpoenaed to appear in open court the Court's reply was,

> "Wait a minute, that would be the most unheard of thing I ever encountered." (Tr. 244)

The Government has further asserted that the petitioner's daughter instigated the trip to see Sidran. This is expressly negatived in the record.[4]

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[4] The transcript discloses the following colloquy: (Tr. 275)
"Mr. Finn: May I ask you one thing, your Honor, did she request you to go down to Columbus?
The Court: No.
Mr. Finn: To meet Sidran?
The Court: But she did request that I get in touch with the FBI and look into all the affidavits."

V.

In view of the totality of the facts, the Court of Appeals should have remanded the case for the consideration of the evidence of the favors shown Banning in Nebraska.

Petitioner's counsel realize that if there were no question in this case except that raised by the refusal of the Court of Appeals to remand this case for evidence discovered after petitioner's appeal had been perfected, this Court would probably not grant *certiorari*. But this is a case in which petitioner's conviction depended on Banning's testimony, where a vital issue was whether Banning was disinterested, where the Trial Judge has already said that no jury would believe Banning, where the Trial Judge has made an unconstitutional investigation of the facts, and where, finally, petitioner tenders even further irrefutable evidence of Banning's perjury in the matter of his disclaimer of motive for testifying against petitioner.

The total complex of facts in this case demonstrates a denial of due process of such gravity as should elicit *certiorari* and result in reversal.

Respectfully submitted,

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Counsel for Petitioner.